

IN THE CHANCERY COURT OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY

NTN+ LLC,

Petitioner,

v.

THE PROCUREMENT BOARD OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
TENNESSEE and THE CHIEF
PROCUREMENT OFFICER AND
PURCHASING AGENT MICHELLE A.
HERNANDEZ-LANE (ONLY IN HER
OFFICIAL CAPACITY),

Respondents.

)
) Case No. 19-579-III
) Chancellor hyle

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INTRODUCTION

Pursuant to Section 4.36.010(F) of the Metropolitan Code, when a protest to a bid is timely filed, The Metropolitan Government of Nashville and Davidson County ("Metro") "shall not proceed further with the solicitation of or with the award of the contract until the Purchasing Agent, after consultation with the head of the using agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the metropolitan government." Here, there is no dispute that NTN+ LLC ("NTN+" or "Petitioner") timely filed a protest to Metro's improper disqualification of its response to Request for Quotation 1207658 (the "2019 RFQ"). The 2019 RFQ relates to a solicitation by Metro for a third party to operate Metro's on-street and certain garage parking for a period of thirty years.

Instead of complying with Section 4.26.010(F), Metro proceeded with the 2019 RFQ, stating only that "it is in the best interest" of Metro to do so. There is also no evidence that the Purchasing Agent consulted with the head of the using agency.¹ Furthermore, after NTN+ attempted to appeal that decision to the Procurement Appeals Board - the next step in the procedure set forth in Metro's procurement rules - the Procurement Appeals Board failed to respond, and the Purchasing Agent asserted that its decision to immediately proceed with the other bidder is unappealable.

Metro seems to attempt to justify its position by citing to a timing "emergency" related to Metro's budget for Fiscal Year 2020 ("FY 2020"), which begins on July 1, 2019 ("2020 Fiscal Year"). This argument fails for at least two reasons. First, there is nothing in the Metro Charter or Metro Code that requires that a contract be "finalized" before the start of a new fiscal year for the projected revenue to be considered for budget planning purposes. In fact, Metro's 2019 fiscal year budget factored in revenue from certain sales of Metro owned real property that were not finalized prior to the beginning of the 2019 fiscal year.² Second, the need to complete the contract by June 30 so that projected revenue can be factored into the FY 2020 budget is not the type of "substantial interest" that needs to be protected. Indeed, a thirty-year transaction that for

¹ Actions Metro has taken since NTN+'s protest was filed include: 1) notifying the only other respondent, LAZ Parking Georgia, LLC ("LAZ"), of its intent to award LAZ the contract; 2) setting the approval of said contract on the Metro Council calendar; and 3) filing a budget that relies upon the terms of the LAZ contract.

² Upon information and belief, Metro's reason for wanting the parking contract approval process to track with the budget approval process may be one of political expediency. By having the budget depend upon the revenue from the parking contract, it appears the administration is applying pressure to the Metro Council to either approve the contract or be the reason certain expenditures may be removed from the budget. It goes without saying that budgeting politics is not a "substantial interest" as required by the regulations.

the first time outsources Metro's on-street parking is not something that should be rushed. To the contrary, this type of arrangement should be carefully considered and debated – especially considering that Petitioner believes its proposal is far more lucrative to Metro than the proposal currently being negotiated.³

NTN+ is asking this Court to reverse Metro's decision to "proceed further" with the current negotiations and require Metro to comply with its own rules. As discussed below, an additional consequence of that decision will be to net Metro an additional \$30,000,000 and demonstrate the city's commitment to diversity in contracting.

STATUTORY REQUIREMENTS FOR THIS REQUEST

1. This action is being brought pursuant to Section 27-8-102 of the Tennessee Code, as a statutory writ of certiorari to correct errors of fact and law made by Metro's Purchasing Agent. More specifically, Metro's Purchasing Agent made an incorrect final decision as to a stay and then informed NTN+ that this decision is unappealable. The Purchasing Agent's decision is one for which no judicial review is provided, is the result of an essentially judicial function, and finally determined NTN+'s rights. As a result, her decision should be reversed as both made pursuant to an improper standard and incorrect under the correct standard.

2. This action is also being brought pursuant to Section 27-8-101 of the Tennessee Code, as a common law writ of certiorari to correct Metro's Purchasing Agent's illegal and improperly motivated actions. Metro's Purchasing Agent made a final, essentially judicial decision as to a stay that was contrary to relevant Metro law, ordinance and

³ Over the 30-year term, NTN+'s response would provide Metro with \$30,000,000 more than LAZ's proposal as a result of NTN+ having a much lower operative expense percentage than LAZ. This does not account additional money Metro would receive from NTN+'s proposal as a result of NTN+ having \$70,000,000 less in expenses to be subtracted out of the revenue share.

regulations, in what appears to be a rush to finalize a contract so that its approval by Council would track with Council's approval of a budget, all at the expense of fundamental fairness and diversity planning. There is no legal requirement that the contract be finalized before the beginning of FY 2020 for the projected revenue to be considered factored in as part of the budget. As a result, the Purchasing Agent's decision should be quashed, and the automatic stay resulting from a timely-filed protest should be instituted.

3. Finally, NTN+ brings this action pursuant to Section 27-9-101 of the Tennessee Code of the same reasons listed in Paragraphs 1 and 2, above.

4. Pursuant to Section 27-8-106 of the Tennessee Code, NTN+ states that this is its first application for a writ and that the allegations contained in all numbered paragraphs herein are made under oath, as evidenced by this statement and signed, notarized statement of oath at the end of this writ.

5. Metro rendered the decisions underlying this writ on: 1) April 26, 2019, when its Purchasing Agent informed NTN+ that it was not abiding by the required stay because "it is in the best interest" of Metro not to do so (See Ex. 1); and 2) April 29 2019, when its Purchasing Agent informed NTN+ that her decision was final and unappealable (See Ex. 2). Both of those decisions occurred well within 60 days of the filing of this writ.

6. Venue is proper in this Court, as Metro "resides" in this judicial district.

7. Metro is the only proper defendant to this writ as it was the only party "involved in the hearing" before the Metro.

8. The Purchasing Agent's decisions that serve as a basis for this writ make a material change in the status of the matters being determined herein. The Purchasing

Agent's decision to opt out of the automatic stay will result in the negotiation of a final contract with LAZ, which will in turn lead to the consideration of that contract by the Metro Council, which may then lead to the approval and start of the performance of the final contract. The automatic stay of proceedings during a protest is to prevent those very things from happening, as once they do, unwinding the effects of any one of them (much less all of them) becomes very difficult. It is also worth noting that the issuance of a writ of supersedeas will not harm Metro or the passage of the administration's budget. As a result, NTN+ is seeking a writ of supersedeas, which would stay all further decisions and actions by Metro related to the RFQ.

9. NTN+ gives a bond for costs, with its counsel WSMLEGAL as the surety, in an amount not to exceed \$500. The contract resulting from the 2019 RFQ will not be effective until several additional procedural steps are completed, including approval by the Metro Council after three readings and approval by Metro's Traffic and Parking Commission. In addition, no material preparations or expenditures by Metro for finalizing the resulting contract are required. As a result, no damage to Metro will result from this Court's issuance of a writ of supersedeas pending final decision. Accordingly, only a minimal bond of \$500 should be required against any supersedeas / stay issued by this Court.

10. In an effort to resolve this dispute, on April 29, 2019, counsel for NTN+ met with counsel for Metro. At that meeting, counsel for NTN+ notified counsel for Metro of the possibility of it filing a writ of supersedeas. In addition, on May 2, counsel for NTN+ spoke with counsel for Metro to inform her that he would be filing this writ on May 3.

11. While this writ does not involve a final decision revoking, suspending, or denying a license or permit that is required to engage in any activity protected by the First Amendment, NTN+ requests an expedited resolution of the issues contained herein as there are time-sensitive aspects to consider.

UNDERLYING FACTS⁴

I. The 2018 RFQ

12. In 2018, Metro issued Request for Quotation 1037675 (the "2018 RFQ"). The 2018 RFQ sought quotations to modernize and manage on-street parking in Davidson County.

13. LAZ and Atwater Infrastructures LLC ("Atwater") both responded to the RFQ, as did four other entities. Atwater is a member of NTN+.

14. Metro scored Atwater's response 85.5 out of 100. Metro scored LAZ's response 62 out of 100.

15. Atwater scored higher than LAZ, and all other responders, in each of the four categories Metro stated it would consider: technical and experience capabilities, capacity and approach, financial proposal, and diversity plan.

16. On January 25, 2019, Metro notified Atwater of its intent to award it the related contract.

17. Over the next two months, Metro and Atwater spent a significant amount of time working together to develop parking policies, a concession agreement, a revenue

⁴ While this writ relates to the Purchasing Agent's decision on the stay, additional background about the RFQ and its history is necessary to gain a complete understanding of the relevant issues. As such, that background is included in this section.

sharing model, Metro's presentation to Metro's Traffic and Parking Commission, and various other terms for a final contract.

18. At Metro's request, and as evidence of its importance, Atwater, a minority-owned business, further enhanced its diversity plan related to the contract.

19. On March 11, after a two-month negotiation of the material terms of a final relationship, Metro submitted the proposed parking regulations to the Metro Traffic and Parking Commission, which it unanimously approved.

II. LAZ's Protest and Metro's Withdrawal of the 2018 RFP.

20. LAZ filed a protest, seeking review of Metro's decision to award the contract to Atwater.

21. Metro's Purchasing Agent denied LAZ's protest.

22. LAZ appealed that decision to Metro's Procurement Appeals Board. As that board was considering the protest, on March 6, Metro's Purchasing Agent decided to cancel the 2018 RFQ.

23. Metro's Purchasing Agent did not give any reason for cancelling the 2018 RFQ, in violation of applicable regulations. That said, Atwater chose not to file a protest to the Purchasing Agent's violation of Metro regulations, instead seeking to move forward with Metro in good faith.

III. The 2019 RFQ.

24. On March 11, Metro informed Atwater that it intended to issue an updated RFQ with a much more rapid response requirement.

25. On or about March 21, Metro issued the 2019 RFQ. The 2019 RFQ required all proposals to be submitted by April 12, 2019.

26. Over the course of the next two weeks, Metro amended the RFQ multiple times, with the final amendment issued on April 8, 2019.

27. The contents of the 2019 RFQ and its differences from the 2018 RFQ demonstrate that Metro learned from and adopted much of what it and Atwater had discussed in their prior negotiations. In fact, substantial portions of the concession agreement developed by Atwater appeared in 2019 RFQ. In addition, the 2019 RFQ contained a net revenue share agreement recommended by Atwater, as opposed to the gross revenue share agreement used in the 2018 RFQ.

28. One primary difference between the 2018 RFQ and 2019 RFQ was Metro strongly encouraged that a parking operator be a direct contractor with Metro in the 2019 RFQ.

29. As part of its 2018 RFQ response, which Metro had accepted, Atwater had proposed a subcontractor relationship between it and a parking operator.

30. This change required Atwater to partner with a parking operator in the very short time Metro allowed for responding to the 2019 RFQ.

31. Atwater did so, partnering with Republic Parking Systems, LLC, to form NTN+.

32. LAZ is a parking operator, and Metro's change did not require any additional effort on that front to respond to the 2019 RFQ. Metro was aware of that.

33. NTN+ timely submitted its response to the 2019 RFQ on April 12 on iSupplier.

34. There was only one other response to the 2019 RFQ – LAZ's.

35. Over the 30-year term, NTN+'s response would provide Metro with \$30,000,000 more than LAZ's proposal as a result of NTN+ having a much lower operative expense percentage than LAZ. This does not account additional money Metro would receive

from NTN+'s proposal as a result of NTN+ having \$70,000,000 less in expenses to be subtracted out of the revenue share.

36. On Sunday, April 14, at 11:06 AM, Metro Senior Procurement Officer Terri Troup emailed NTN+ representatives to inform NTN+ that she was unable to locate the pricing worksheet as an attachment to NTN+'s response. She asked whether the omission "was in error" or whether it was an intentional omission. Finally, she asked for a response by 8:30 AM on Monday, April 15.

37. It being a Sunday, without being absolutely sure what was or was not included in NTN+'s initial response and out of an abundance of caution, NTN+ sent Ms. Troup the pricing worksheet that same day at 4:43 PM.

38. It is important to note that the information contained in the subsequently sent pricing worksheet was consistent with the information that had already been received by Metro.⁵

39. On April 17, Metro notified NTN+ that it had disqualified NTN+'s response as "nonresponsive," "due to a failure to comply with the Financial Proposal section[.]"

40. On April 24, Metro notified NTN+ that it intended to award the contract to LAZ.

IV. NTN+'s Protest.

41. The following day, April 25, NTN+ filed its bid protest and asked for a stay of contract negotiations with LAZ.

42. On April 26, the Purchasing Agent informed NTN+ that it was not staying contract negotiations with LAZ because of her "determination that it is in the best interest of" Metro. Her written determination made no mention of that proceeding with the "award of

⁵ The pricing worksheet is a detailed spreadsheet that further details the basic parameters of the transaction that were contained in sections of NTN+'s response Metro received on April 12.

the contract without delay is necessary to protect substantial interests" of Metro as required by Section 4.36.010(F). It also made no mention of any discussions she had had with the "head of the using agency" as required by the same Section.

43. That same day, NTN+ appealed the Purchasing Agent's stay determination to Metro's Procurement Appeals Board. (See Ex. 3.)

44. On April 29, Metro's Purchasing Agent sent a letter declaring her decision final and unreviewable.

45. Since that time, NTN+, has learned that LAZ's response was not adequate as it relates to the diversity plan requirements of the 2019 RFQ. In addition, the pricing worksheet submitted by LAZ was incomplete. Media sources have reported that Metro, rather than disqualifying LAZ's response as in the case of NTN+, intended to negotiate diversity planning terms with LAZ.

METRO CODE, RULES, AND REGULATIONS APPLICABLE TO THE UNDERLYING PROTEST

46. Chapter 4.12.010 of the Metro Code defines "request for proposals[.]" It has separate definitions for "invitation to bid" and "multi-step sealed bidding[.]" From this distinction, it is clear that the Metro Code views bid processes different than RFQ processes.

47. Chapter 4.12.030 – entitled "Competitive sealed bidding" – governs Metro's "bid" process.

48. Chapter 4.12.040 – entitled "Competitive sealed proposals" – governs Metro's RFQ process.

49. In the "bid" process, Section 4.12.030(B) requires that an "invitation to bid" include "a purchase description and all contractual terms and conditions applicable to

the procurement." Section 4.12.030(E) states that, "[b]ids shall be accepted without alteration or correction, except as authorized in this code." Section 4.12.030(F) goes on to state that, "[a]fter bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the metropolitan government or fair competition shall be permitted."

50. In its powers granted in the Metro Code, the Procurement Officer has also promulgated regulations related to the "bid" process. Those include R4.12.100.05.3(a)(ii), which states that a bid may be rejected if it "is not responsive, that is, it does not conform in all material respects to the Invitation for Bids[.]"

51. The RFQ process, on the other hand, explicitly provides for discussion between the offerors and revision of proposals. Chapter 4.12.040(F) of the Metro Code states:

As provided in the request for proposals and under regulations promulgated by the standards board, ***discussions may be conducted*** with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award ***for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.*** Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

Id. (emphasis added).

52. In its powers granted in the Metro Code, the Procurement Officer has also promulgated rules related to the RFQ process. In distinguishing the "bid" process from the RFQ process, R4.12.040.02 states,

An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal, and in prices, may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding (except to the extent allowed in the first phase of multi-step sealed bidding).

53. The Procurement Officer also promulgated R4.12.040.15.3, which states:

This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

a) During Discussions; Prior to Best and Final Offers. Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

b) Minor Informalities. Minor informalities, unless otherwise corrected by an offeror as provided in this Section, shall be treated as they are under competitive sealed bidding. See Section R4.12.030.13.4 (a) (Mistakes in Bids, Mistakes Discovered After Opening but Before Award).

c) Correction of Mistakes. If discussions are not held, best and final offers are not solicited, or the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:

i) the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or

ii) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value that clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.

54. The Procurement Officer also chose not to adopt the language related to rejection of a bid for nonresponsiveness in the "proposal" process. Instead, it uses less restrictive language in R4.12.100.05.3(b)(ii), which states that a proposal may be rejected if "the proposal *ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails* to meet Metro's announced requirements in some material respect[.]" *Id.* (emphasis added).

55. Furthermore, R4.12.100.05.3(b) states:

Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and Metro's stated requirement may be revised or clarified after proposals are submitted. This flexibility must be considering in determining whether reasons exist for rejecting all or any part of a proposal.

56. Given the very different language and rules related to the bid process and the RFQ process, it is obvious that the RFQ process is much less rigid and seemingly requires a back and forth between Metro and those responding.

REASONS THE UNDERLYING PROTEST SHOULD SUCCEED

1 – Metro Applied the Bid Standard to the RFQ Process

57. In informing NTN+ of its disqualification of NTN's 2019 RFQ, Metro stated that the reason NTN+ was disqualified was because its response was "nonresponsive" for failure to include a pricing worksheet.

58. This reason is specifically referenced in the rules promulgated by the Procurement Officer as it relates to "bids," not RFQs.

59. As a result, Metro applied the wrong rules / standard in deciding to reject NTN+'s proposal.

2 – Metro's Failure to Accept NTN+'s Submission of a Pricing Worksheet

60. R4.12.040.15.3 allows for the correction of mistakes in submission prior to the award of a contract.

61. Here, Metro failed to consider or allow the correction in violation of that regulation.

3 – Metro Treated Different Bidders Differently

62. Metro disqualified NTN+'s proposal as "nonresponsive" for failure to include adequate pricing information.

63. Upon information and belief, Metro did not disqualify LAZ's proposal as "nonresponsive" even though it failed to include an adequate diversity plan and its pricing worksheet was incomplete.

64. Metro's actions constitute unequal treatment of two respondents.

4 – Metro Violated the Best Interests Provisions of the Metro Code in Awarding the Contract to LAZ

65. Over the life of the 30-year contract, NTN+'s proposal provides Metro with roughly \$30,000,000 more than LAZ's proposal. Part of that benefit comes from NTN+ imposing a lower internal rate of return of 8 percent compared to LAZ's 9.75 percent.

66. Metro is accorded a great deal of flexibility when it comes to discussing and awarded RFQs.

67. Metro, for reasons still unknown to NTN+, but which it hopes to discover in the course of this action, chose to accept LAZ's proposal rather than negotiate further with NTN+ to its own detriment.

CAUSES OF ACTION

1 – Issuance of a Stay

The Purchasing Agent Did Not Comply with Chapter 4.36.010(F)

68. Chapter 4.36.010(F) implements an automatic stay of all proceedings related to an RFQ if a protest is timely filed.

69. The Purchasing Agent can only set aside that automatic stay after consultation with the head of the using agency and a finding that the "award of the contract without delay is necessary to protect [Metro's] substantial interest."

70. Here, the Purchasing Agent improperly set aside the automatic stay without a finding as to Metro's "substantial interest" or whether proceeding with the "award of the contract without delay" is "necessary[.]" and without discussing her decision with the head of the using agency.

71. Furthermore, the Purchasing Agent now asserts that her decision is completely unreviewable.

72. The Purchasing Agent's actions are illegal, incorrect, and apply the wrong legal standard.

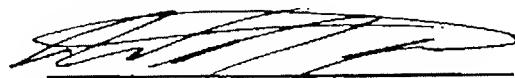
73. NTN+ has been damaged by the Purchasing Agent's decision and has standing to pursue its reversal.

RELIEF REQUESTED

In light of facts and law recited above, NTN+ requests the following relief:

1. That the Court issue a writ of supersedeas barring any further action on the 2019 RFQ;
2. That the Court reverse the Purchasing Agent's decision to set aside the automatic stay;
3. That the Court order the preparation of the record of the decisions below;
4. That the Court hear and decide this matter on an expedited schedule; and
5. That the Court order any other such remedy it considers just and appropriate.

Respectfully submitted,



William N. Helou (#22839)
WSMLEGAL PLLC
2817 West End Ave, Suite 126-107
Nashville, TN 37203
615.900.5585
whelou@wsmlegal.com

Attorney for NTN+ LLC

WSMLEGAL PLLC is the surety for costs in this action, not to exceed \$500.

VERIFICATION

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, R. Graham White, III, on behalf of NTN+ LLC, swear or affirm that the foregoing numbered allegations in this writ are true, accurate, and complete to the best of my knowledge.

By: R. Graham White, III

Title: Soce Member

Sworn to and subscribed before me on this 3rd day of May, 2019.

John J. Mowen
Notary Public

My commission expires: 3/7/2023

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Exhibit 1

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

April 26, 2019

RFQ# 1207658 Parking Management and Modernization Services

Please note that at timely protest of the intent to award a contract to LAZ Parking Georgia, LLC pursuant to the above referenced solicitation has been received by the Purchasing Agent.

This correspondence serves as notification of the Purchasing Agent's determination that it is in the best interest of the Metropolitan Government of Nashville and Davidson County (Metro) to proceed with contract negotiations with the selected offeror.

Respectfully,



Michelle A. Hernandez Lane
Chief Procurement Officer/Purchasing Agent
The Metropolitan Government of Nashville and Davidson County

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Procurement Division

730 Second Avenue South, Suite 112
P.O. Box 196300
Nashville, Tennessee 37219-6300

www.Nashville.gov
Phone: 615-862-6180
Fax: 615-862-6179

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Exhibit 2

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

April 29, 2019

Mr. Saul Solomon
Klein Solomon Attorneys at Law, PLLC
1224 6th Avenue North
Nashville, TN 37208

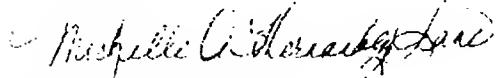
RFQ# 1207658 Parking Management and Modernization Services

Dear Mr. Solomon:

This correspondence serves to notify you that I am in receipt of your communication dated April 26, 2019, "Notice of Appeal to the Procurement Appeals Board Denial of Stay of All Proceedings Related to RFQ# 1207658". Please note that the Purchasing Agent's decision under authority granted by the Procurement Code 4.36.010(F) and the Procurement Regulations at 4.36.010.(g) is not subject to appeal.

Please note that the contract that is the subject of this procurement must be approved by the Metropolitan Council by ordinance. There should be no reason why your client's protest cannot be resolved before the Council takes final action. A hearing on the protest will be scheduled in the coming days.

Respectfully,



Michelle A. Hernandez Lane
Chief Procurement Officer/Purchasing Agent
The Metropolitan Government of Nashville and Davidson County

Cc: Procurement File
Jon Cooper, Director of Law
Talia Lomax-O'dneal, Chair, Procurement Appeals Board

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Procurement Division

730 Second Avenue South, Suite 112
P.O. Box 196300
Nashville, Tennessee 37219-6300

www.Nashville.gov
Phone 615-862-6180
Fax. 615-862-6179

Exhibit 3



Klein Solomon

ATTORNEYS AT LAW

Saul Solomon

direct 615.538.7805

saul.solomon@kleinplc.com

April 26, 2019

Talia Lomax-O'dneal
Director of Finance
1 Public Square
Suite 106
Nashville, Tennessee 37201

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FILED
Klein Solomon PLLC

Re: Notice of Appeal to the Procurement Appeals Board
Denial of Stay of All Proceedings Related to RFQ #1207658

Dear Ms. Lomax-O'dneal,

The Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") is moving expeditiously to award a 30-year contract under RFQ #1207658 (the "RFQ"). In this process, Metro rejected a proposal submitted by NTN+ LLC ("NTN+") that would have generated \$30 million more for Metro than the only competing proposal over the course of the contract. The sole procedural reason for rejecting NTN+'s proposal violates multiple ordinances in the Metropolitan Code of Ordinances (the "Metro Code"), the Regulations to the 1992 Procurement Code, as revised in April 2017 (the "procurement regulations"), and principles of equity. NTN+ filed a timely protest and requested that discussions with awarding the contract be stayed, as required by Metro Code § 4.36.010(F) and procurement regulation R4.36.010(g). On April 26, 2019, the Purchasing Agent denied the request for a stay. (Ex. 1.) This decision substantially prejudices NTN+'s ability to be heard on its protest, is arbitrary and capricious, and is contrary to law. Accordingly, NTN+ respectfully requests that the Procurement Appeals Board (the "Appeals Board") reverse the Purchasing Agent's denial of a stay and require that all discussions between the Purchasing Agent and LAZ Parking Georgia, LLC ("LAZ") cease pending a final decision of the protest on the merits.

I. Jurisdiction

The Appeals Board has jurisdiction over the denial of a stay, which a protester is generally entitled to under Metro Code 4.36.010(F) and procurement regulation R4.36.010(g). The Metro Code § 4.36.100(A) gives the Appeals Board jurisdiction over determinations by the Purchasing Agent made under § 4.36.010. The decision to deny a stay is a determination by the Purchasing Agent made under Metro Code § 4.36.010(F).

I]. Standard of Review

Procurement regulation R4.36.100 requires the Procurement Appeals Board to hear and decide this appeal using a *de novo* standard of review.

III. Legal Standard

Stays of procurements during protests are immediate and automatic. Metro Code § 4.36.010(F). A limited exception in the Metro Code provides that the purchasing agent may, after consultation with the head of the using agency, make a written determination "that the award of the contract without delay is necessary to protect substantial interests of the metropolitan government." *Id.* That same language is repeated in procurement regulation R4.36.010(g).

Put simply, the Purchasing Agent did not make the required determination that "award of the contract without delay is necessary to protect substantial interests of the metropolitan government." Instead, in a letter dated April 26, 2019, the Purchasing Agent wrote that she determined that it is "in the best interest of the Metropolitan Government of Nashville and Davidson County (Metro) to proceed with contract negotiations with the selected offeror." *The standard that the Purchasing Agent used is substantially lower than the standard required by the Metro Code and the procurement regulations.* First, the Purchasing Agent did not make a determination regarding the "award of the contract without delay" at all, but instead made a determination regarding her decision "to proceed with contract negotiations with the selected offeror." Next, she did not decide whether it was "necessary to protect substantial interests of" Metro, but instead decided that it was in the "best interest" of Metro. The Purchasing Agent denied the stay based on the incorrect standard, and the decision should be reversed.

There are significant issues at stake both legally and substantively in connection with this protest. As stated in NTN+'s protest (Ex. 2), its proposal would have generated an additional \$30 million for Metro over the course of the contract. Additionally, NTN+'s protest raises three substantial questions of law and equity. A determination on these substantial questions of law is necessary to ensure the public's confidence in the procurement process and to ensure that Metro receives full value in connection with the transactions contemplated by the RFQ. Metro Code § 4.04.010(C)(3). Especially on an important contract that fundamentally defines how Metro will be handing parking over the next thirty years, Metro must ensure that its procurement process is fair and equitable.

NTN+ will be substantially prejudiced by the denial of a stay. According to page 7 of the RFQ, Metro intends to award the contract on April 29—*this coming Monday*. (Ex. 3.) Keeping in mind that NTN+ was disqualified not even 10 days ago, this expedited schedule does not allow a protest to be finally heard prior to the contract being awarded. If this schedule is allowed to proceed and NTN+ is successful in its protest, under the Metro Code, Metro will only have two options after a successful protest, neither of which would be in the best interest of Metro: (1) revise the award to comply with the law and ratify and affirm the contract as in the best interest of Metro, or (2) cancel the contract and award LAZ damages. NTN+ contends that if the protest is successful, option 1 would not be possible to achieve—the LAZ award cannot be modified to comply with the law if the law in question relates to the wrongful disqualification of NTN+. Thus, the only remedy available to Metro would be to cancel the LAZ contract and pay LAZ damages. On the other hand,

if a stay is granted and the protest is ultimately successful, Metro can either (1) cancel the RFQ or (2) revise the RFQ to comply with the law. Clearly, Metro's remedies in the case of a successful protest are much more palatable prior to the granting of an award. Thus, given the length of the contract, amount of money at stake, and the substantial questions of law and equity raised in the protest, a final determination on the merits of the protest should be heard prior to an award of the contract.

IV. Automatic Stay Pending Appeal

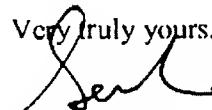
Under the Metro Code, pending this appeal, all discussions between Metro and LAZ to finalize the contract must cease and all proceedings toward the final award of the RFQ must be automatically and immediately stayed. Metro Code § 4.36.010(F) and procurement regulation R4.36.010(g).

V. Conclusion

The Appeals Board should reverse the Purchasing Agent's decision to deny the stay of this procurement so that, if NTN+ is successful on the merits of its protest, a decision on the merits will occur prior to the award of contract. The Purchasing Agent did not make the required findings to deny a stay, and NTN+ and Metro will be substantially harmed if the Purchasing Agent's decision is not reversed. Further, all proceedings related to the RFQ should be automatically stayed pending this appeal.

I appreciate your time in deciding this appeal.

Very truly yours,


Saul Solomon

CC: Michelle A. Hernandez-Lane, Chief Procurement Officer/Purchasing Agent
Jon Cooper, Director of Law